

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

-----X
JOEL F. HOLUBAR,
&
MARIANA H. HOLUBAR

Plaintiffs,

v.

M/Y SWEET DISTRACTION, *in rem*,
CAPTAIN HAMMOND
&
JOHN & JANE DOES

Defendants.
-----X

04 : 11850 GAO

MAGISTRATE JUDGE RBC

RECEIPT # _____
AMOUNT \$ 150
SUMMONS ISSUED yes
LOCAL RULE 4.1 _____
WAIVER FORM _____
MCF ISSUED _____
BY DPTY. CLK. fow
DATE 8/25/04

COMPLAINT & JURY DEMAND

Plaintiffs, Joel F. Holubar & Mariana H. Holubar by and through their undersigned counsel, hereby bring claims against the defendants, jointly and severally, and allege as follows:

JURISDICTION & VENUE

1. This Court has proper jurisdiction over this matter pursuant to: 28 U.S.C. § 1333 (a), 28 U.S.C. § 1333 (1) and 46 U.S.C.S. § App. 688 (2002).

2. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 (a)(2)&(3) as Defendants have committed tortious acts within the State of Massachusetts causing injury to the Plaintiffs.

INTRODUCTION

3. This is a case of admiralty and maritime jurisdiction within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure. Specifically, this is an action for battery and negligence resulting from the negligent and improper operation of the motor

yacht ("M/Y") Cherosa, *vis a vis* its high rate of speed (more than 2x the permitted operational speed) during operation and passage through Hog Island Channel of the Cape Cod Canal on August 24, 2001.

PARTIES

4. Plaintiff, Joel F. Holubar DDS, is a natural person with a principle residence located within the State of New York, County of Suffolk, Hamlet of Brookhaven.

5. Plaintiff, Mariana H. Holubar, is a natural person with a principle residence located within the State of New York, County of Suffolk, Hamlet of Brookhaven.

6. Defendant, Captain Hammond, is a natural person, and upon information and belief was the Captain of the M/Y Sweet Distraction.

7. Defendant M/Y Sweet Distraction *in rem*, upon information and belief, has United States Coast Guard ("USCG").

8. John and Jane Does are other persons who as of today are unknown but are reasonably believed to be the owners and/or operators of M/Y Sweet Distraction.

FACTS

9. At all relevant times to this action, Plaintiffs are the owners of the documented marine vessel "Nordic Star", USCG Documentation Number 957765. Nordic Star is a 42-foot Jersey Dawn Sport Fisherman, with a fourteen (14) foot beam, and a dry displacement weight of approximately 32,000 lbs.

10. Plaintiff, Joel F. Holubar, is a USCG approved captain maintaining a "Coast Guard Licensed Operator of Uninspected Passenger Vessel" license.

11. On August 24, 2001, Plaintiffs were aboard Nordic Star traveling "east" bound in the Cape Cod Canal, a narrow and navigable waterway as defined by U.S.C. Title 33, supervised and managed by the United States Army Corps of Engineers.

12. Nordic Star and plaintiffs were traveling with the current and were entering the Hog Island Channel, the narrowest portion of the Cape Cod Canal.

13. Upon information and belief, the Hog Island Channel is approximately no more than four hundred (400) feet in width.

14. When Nordic Star reached the Hog Island Channel in the Cape Cod Canal when they became aware of a vessel "west" bound in the Cape Cod Canal.

15. The vessel was the M/Y Sweet Distraction.

16. The M/Y Sweet Distraction was west bound traveling against the current.

17. Without right or justification, the M/Y Sweet Distraction was negligently and with reckless abandon being operated at, and traveling in excess of, twenty (20+) knots, which is well in excess of the posted permitted and safe speed as set forth by the U.S. Army Corps of Engineers.

18. The wake, *i.e.*, waves, caused by the M/Y Sweet Distraction's excessive rate of speed, size, and displacement, in addition to the fact that she was traveling against the current, resulted in a wake well in excess of eight (8) feet in height. The wake's waves were of short intervals/intermissions, making their faces steep and abrupt.

19. Upon information and belief, Captain Hammond was captaining the M/Y Cherosa at all times in question on August 24, 2001.

20. Plaintiffs, upon realizing the size of the wake, took immediate and defensive evasive actions, but were limited in choice due to the size of the wake, close proximity of the M/Y Sweet Distraction and narrowness of the Hog Island Channel.

21. Upon repetitive impact of M/Y Sweet Distraction's wake, Nordic Star and Plaintiffs were severely tossed about "like a toy boat in a bathtub", demonstrative of the force and size of the wake.

22. As a result, Nordic Star was physically damaged, gear and equipment, including irreplaceable family memorabilia, were lost and damaged, and Plaintiffs were physically injured.

23. Immediately following the wakes' impact, Plaintiffs contacted the USCG.

24. Plaintiffs began to inspect the damage as they made their way to Sandwich Marina, located in the Cape Cod Canal.

26. Upon arrival at the Sandwich Marina, Plaintiffs were met by USCG Officers, who documented and recorded the damage.

27. Plaintiffs have subsequently sought medical attention, incurred pain and suffering, and lost wages as a proximate result of injuries sustained on August 24, 2001, stemming from the M/Y Sweet Distraction's operation.

28. Plaintiffs have subsequently, and continue to, expend resources and money repairing the damage to Nordic Star, which was a proximate result of the occurrences on August 24, 2001, stemming from the M/Y Sweet Distraction's operation.

CAUSES OF ACTION

COUNT I

(Assault & Battery)

29. Plaintiffs reallege paragraphs 1 through 28 as if fully stated herein.

30. Defendants, acting by and through M/Y Sweet Distraction's operation, intended to cause offensive contact with Plaintiffs and did cause resultant, offensive and harmful contact with Plaintiffs.

31. As a proximate result, Plaintiffs suffered substantial damages, including but not limited to personal injury, pain, suffering, emotional distress, substantial pecuniary losses and physical damage to Plaintiffs' property.

COUNT II

(Negligence – Personal Injury)

32. Plaintiffs reallege paragraphs 1 through 31 as if fully stated herein.

33. Having entrusted the M/Y Sweet Distraction's to Defendant Hammond, Defendants owed a duty of care to Plaintiffs to train, instruct, and supervise operation of the M/Y Sweet Distraction in a legal and safe manner, and in compliance with applicable rules and regulations governing the M/Y Sweet Distraction's use and operation, and/or

otherwise preventing the use and operation of the M/Y Sweet Distraction's in a manner that was likely to cause harm.

34. Defendants breached this duty by failing to train, instruct, and supervise the use and operation of the M/Y Sweet Distraction adequately, and/or by failing to otherwise prevent the use and operation of the M/Y Sweet Distraction in a manner that caused physical personal injury and harm to Plaintiffs.

35. In failing to train, instruct, and supervise the use and operation of the M/Y Sweet Distraction adequately, and/or otherwise preventing the use and operation of the M/Y Sweet Distraction in a manner that caused physical personal injury and harm to Plaintiffs, Defendants acted willfully and/or intentionally, and/or with reckless disregard for Plaintiffs' rights, safety and well being.

36. As the sole and proximate result of Defendants' actions and omissions, Plaintiffs suffered substantial damages, including but not limited to physical injuries, pain, suffering, emotional distress, and substantial pecuniary losses.

COUNT III
(Negligence – Physical Damage)

37. Plaintiffs reallege paragraphs 1 through 36 as if fully stated herein.

38. Having entrusted the M/Y Sweet Distraction's to Defendant Hammond, Defendants owed a duty of care to Plaintiffs to train, instruct, and supervise operation of the M/Y Sweet Distraction in legal and safe manner and in compliance with applicable rules and regulations governing the M/Y Sweet Distraction's use and operation, and/or otherwise preventing the use and operation of the M/Y Sweet Distraction in a manner that was likely to cause harm or damage.

39. Defendants breached this duty by failing to train, instruct, and supervise the use and operation of the M/Y Sweet Distraction adequately, and/or by failing to otherwise prevent the use and operation of the M/Y Sweet Distraction's in a manner that caused harm to Plaintiffs' property.

40. In failing to train, instruct, and supervise the use and operation of the M/Y Sweet Distraction adequately, and/or otherwise preventing the use and operation of the M/Y Sweet Distraction in a manner that caused harm to Plaintiffs' property, Defendants acted willfully and/or intentionally, and/or with reckless disregard for Plaintiffs' rights and property.

41. As a sole and proximate result of Defendants' actions and omissions, Plaintiffs' property was substantially and significantly damaged.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, pray this Court render judgment:

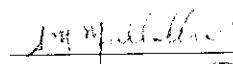
- A. awarding Plaintiffs actual damages, in an amount to be determined, but believed to be in excess of \$175,000.00;
- B. awarding Plaintiffs consequential, compensatory and punitive/exemplary damages;
- C. awarding Plaintiffs their reasonable attorney fees, and
- D. directing such other and further relief as the Court may deem just and proper.

JURY TRIAL DEMAND

In accordance with the provisions of Federal Rules of Civil Procedure, 38(b) and 39, Plaintiffs hereby demand a trial by jury of all issues so triable.

JOEL F. HOLUBAR and
MARIANA H. HOLUBAR,
By their attorneys,

Dated: August 24, 2004



Lee T. Gesmer (BBO #190260)
Kurt Bratten (BBO #644730)
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Joel F. Holubar, et al. v.
1. TITLE OF CASE (NAME OF FIRST PARTY ON EACH SIDE ONLY) M/Y Sweet Distraction, in rem, Captain Hammond & John & Jane Does

2. CATEGORY IN WHICH THE CASE BELONGS BASED UPON THE NUMBERED NATURE OF SUIT CODE LISTED ON THE CIVIL COVER SHEET. (SEE LOCAL RULE 40.1(A)(1)).

I. 160, 410, 470, R.23, REGARDLESS OF NATURE OF SUIT.

II. 195, 368, 400, 440, 441-444, 540, 550, 555, 625, 710, 720, 730, 740, 790, 791, 820*, 830*, 840*, 850, 890, 892-894, 895, 950.

*Also complete AO 120 or AO 121 for patent, trademark or copyright cases

III. 110, 120, 130, 140, 151, 190, 210, 230, 240, 245, 290, 310, 315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 370, 371, 380, 385, 450, 891.

IV. 220, 422, 423, 430, 460, 510, 530, 610, 620, 630, 640, 650, 660, 690, 810, 861-865, 870, 871, 875, 900.

V. 150, 152, 153.

3. TITLE AND NUMBER, IF ANY, OF RELATED CASES. (SEE LOCAL RULE 40.1(G)). IF MORE THAN ONE PRIOR RELATED CASE HAS BEEN FILED IN THIS DISTRICT PLEASE INDICATE THE TITLE AND NUMBER OF THE FIRST FILED CASE IN THIS COURT.

4. HAS A PRIOR ACTION BETWEEN THE SAME PARTIES AND BASED ON THE SAME CLAIM EVER BEEN FILED IN THIS COURT?

YES

☒ NO

5. DOES THE COMPLAINT IN THIS CASE QUESTION THE CONSTITUTIONALITY OF AN ACT OF CONGRESS AFFECTING THE PUBLIC INTEREST? (SEE 28 USC §2403)

YES

☒ NO

IF SO, IS THE U.S.A. OR AN OFFICER, AGENT OR EMPLOYEE OF THE U.S. A PARTY?

YES

☒ NO

6. IS THIS CASE REQUIRED TO BE HEARD AND DETERMINED BY A DISTRICT COURT OF THREE JUDGES PURSUANT TO TITLE 28 USC §2284?

YES

☒ NO

7. DO ALL OF THE PARTIES IN THIS ACTION, EXCLUDING GOVERNMENTAL AGENCIES OF THE UNITED STATES AND THE COMMONWEALTH OF MASSACHUSETTS ("GOVERNMENTAL AGENCIES"), RESIDING IN MASSACHUSETTS RESIDE IN THE SAME DIVISION? - (SEE LOCAL RULE 40.1(D)).

YES

☒ NO

A. IF YES, IN WHICH DIVISION DO ALL OF THE NON-GOVERNMENTAL PARTIES RESIDE?

EASTERN DIVISION

CENTRAL DIVISION

WESTERN DIVISION

B. IF NO, IN WHICH DIVISION DO THE MAJORITY OF THE PLAINTIFFS OR THE ONLY PARTIES, EXCLUDING GOVERNMENTAL AGENCIES, RESIDING IN MASSACHUSETTS RESIDE?

EASTERN DIVISION

CENTRAL DIVISION

WESTERN DIVISION

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME Kurt Bratten, ESq.

ADDRESS Gesmer Updegrove, LLP, 40 Broad Street, Boston, MA 02109

TELEPHONE NO. (617) 350-6800

JS 44
(Rev. 07/86)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I (a) PLAINTIFFS

Joel F. Holubar and
Mariana H. Holubar

Suffolk Co.,

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF NY
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

M/Y Sweet Distraction, in rem,
Captain Hammond & John & Jane Does

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Kurt Bratten, Esq.
Gesmer Updegrove LLP
40 Broad Street, Boston, MA 02109
BBO #635542
(617) 350-6800

ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION

(PLACE AN X IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(For Diversity Cases Only)

(PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|---------------------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input checked="" type="checkbox"/> 2 | <input checked="" type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. CAUSE OF ACTION

(CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE)

DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY. This is an action for battery and negligence resulting from negligent and improper operation of the motor yacht ("M/Y") Sweet Distraction in rem, during operation and passage through the Cape Cod Canal on August 24, 2001.

V. NATURE OF SUIT

(PLACE AN X IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input checked="" type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury—Med Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Food & Drug <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395f) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC (405(g)) <input type="checkbox"/> 863 DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 Habeas Corpus <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights		

VI. ORIGIN

(PLACE AN X IN ONE BOX ONLY)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 ☐ DEMAND \$ _____ Check YES only if demanded in complaint: JURY DEMAND: ☒ YES ☐ NO

VIII. RELATED CASE(S) IF ANY

(See instructions):

Honorable JUDGE Judith G. Dein DOCKET NUMBER 03-12404 NG

Kent Kholberger, The Chase Freedman-Family Trust, M/Y Cherosa, in rem

DATE

08/24/04

SIGNATURE OF ATTORNEY OF RECORD

Kurt Bratten *(signature)*